STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Maite Murphy, Circuit Court Judge

Appellate Case No. 2018-001530

CHRISTIAN COLEMAN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Whether trial counsel was ineffective for eliciting hearsay testimony through the lead investigator that Ronnie Washing was the getaway driver, when counsel testified that he had a strategic reason for eliciting the testimony.

STATEMENT

On May 12, 2010, an Orangeburg County grand jury indicted petitioner for murder, armed robbery, first-degree burglary, and kidnapping. App. 1372-84. On November 23, 2010, petitioner was tried before the Honorable Edgar W. Dickson and a jury. App. 1. Petitioner was represented by Richard Lackey. App. 1. Donald Sorenson represented the State. App. 1. Petitioner was tried along with four co-defendants: (1) Ralph B. Coleman, (2) Walter L. Harris, (3) Danny Ryant, Jr., and (4) Mario N. Shivers. App. 1. Jillian Ullman, Scott Palmer, Douglas Mellard, and Joshua Koger, Jr. represented the co-defendants. App. 1. The jury convicted all of the defendants on all charges. App. 1239-1264. Judge Dickson sentenced petitioner to concurrent terms of thirty years' imprisonment for armed robbery, and forty-five years' imprisonment for murder and first-degree burglary. App. 1273.

After his appeal was affirmed, on June 17, 2013, petitioner filed a PCR application. App. 1294. On May 20, 2015, a hearing was held before the Honorable Maite Murphy. App. 1313. Jonathan D. Waller represented petitioner and J. Clayton Mitchell represented the State. App., 1313. On November 9, 2015, Judge Murphy denied petitioner relief. App. 1351. Petitioner filed a Rule 59(e), SCRCP motion which was denied on January 31, 2018. This appeal follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

RELEVANT FACTS

Six people were charged with murdering Charles Pringle in a drug-related home invasion. Approximately a month before trial, the State learned that a man named Ronnie Washington may have been the getaway driver. App. 1338. The State never called Ronnie Washington to testify, but trial counsel nevertheless elicited damaging inadmissible hearsay regarding Washington's involvement and linking Washington to his own client. App. 939-42.

The State's primary evidence against the five men in this joint trial came from the youngest co-defendant, who was not tried, Patrick Tyler. App. 461-62. Tyler was sixteen at the time of the shooting and seventeen at the time of trial, but was charged as an adult. App. 461-62. Tyler testified that he knew all five of the defendants on trial. App. 463-66.

In the early evening of March 12, 2010, Tyler got a phone call from Danny Ryant telling him Mario Shivers had guns and to come to Ralph Coleman's house to see them. App. 466-68. Ralph Coleman and Shivers were at the house when Tyler arrived. App. 470. The men smoked marijuana and Shivers began discussing a plan to rob Pringle. App. 471-73. Shivers knew Pringle dealt drugs, a fact which Pringle's girlfriend confirmed at trial. App. 473. App. 366.

The group did not have transportation to Pringle's house. App. 474. Petitioner and a friend arrived in a Ford Explorer. App. 474. Tyler did not recognize petitioner's friend, the driver, and did not remember ever learning the driver's name. App. 474-75. The solicitor asked Tyler, "Did you even know anyone by the name of Ronnie Washington back then?" and Tyler replied, "No, sir." App. 475.

On the way to Pringle's, Shivers discussed the plan to rob Pringle. App. 476-77. They picked up co-defendant Walter Harris. App. 477. When they arrived at Pringle's, Harris went to the house, bought marijuana, and returned. App. 480. Harris said he knew somebody in Pringle's

house and no longer wanted to participate in the robbery, so the group picked up Danny Ryant. App. 480-81.

They returned to Pringle's apartment and Tyler and Ralph Coleman went to the door and asked to buy marijuana. App. 483. While Tyler bought marijuana, Ralph Coleman pulled his gun on the woman selling the drugs and the rest of the group "came in with the guns." App. 483- 84. Tyler claimed petitioner had a chrome nine millimeter pistol. App. 484. The group ransacked the apartment and duct-taped Pringle. App. 484-86. One of the men shot Pringle's dog and, minimizing his involvement, Tyler testified he then ran out of the house. App. 486. While outside the house, Tyler said he heard multiple gunshots. App. 486. The pathologist found twenty-four gunshot wounds in Pringle's body. App. 791.

At the end of Tyler's direct-examination, the solicitor asked whether he had promised "any sentence" in exchange for his cooperation and Tyler said no. App. 502. The solicitor then said, "But the one thing we are allowing you to do because of your cooperation back in March and your testimony is, we're going to reduce your murder to voluntary manslaughter?" and Tyler replied yes. App. 502.

The solicitor then asked again whether Tyler knew who the driver of the Explorer was and Tyler said no. App. 503. Despite no evidence being admitted at this point in the trial that Ronnie Washington was the driver of the Explorer, on cross-examination of Tyler, trial counsel asked, "So, whatever y'all talked about when you got in the back seat, both Ronnie Washington and Christian Coleman heard, is that correct?" App. 512. Tyler replied, "Yes." App. 512. Trial counsel then asked Tyler, "And do you know this Ronnie Washington fellow who was the driver, do you know he was never arrested?" App. 514. Trial counsel had to repeat the question and Tyler replied that he did not know this information. App. 514.

The State never called Ronnie Washington. The State's last witness was the lead investigator, Officer James Shumpert. App. 872-73. Officer Shumpert testified on direct that Tyler told the police he did not know the identity of the driver of the Explorer and then the following colloquy occurred:

Q. Let me ask you, what was the first time you came into physical contact with a young man by the name of Ronnie Washington?
A. Two weeks ago, I believe it probably would be November thirtieth.
Q. And did you take a statement from him at that time?
A. I did.
Q. Let me show you State's exhibits number twenty, twenty-eight and twenty-nine. Have you seen those photographs before?
A. Yes, sir.
Q. And whose, whose Ford Explorer, who does that Ford Explorer belong to?
A. Ronnie Washington.
Q. And who was driving this back on March the twelfth of [2010]?
A. Ronnie Washington.
Q. Now, has Mr. Washington at this time been charged with anything, lieutenant?
A. Not at this time.
Q. And is that something the sheriff's office is still evaluating?

A. We are.
Q. And yet again, he just came to your attention two weeks ago?
A. Two weeks ago.

App. 888-90. Trial counsel failed to object to the hearsay about Ronnie Washington as the driver, which by the solicitor's implication, came from Washington's statement. App. 888-90.

Trial counsel elected to cross-examine Officer Shumpert about Ronnie Washington's statement. App. 937-42. Trial counsel again confirmed that Officer Shumpert took a statement from Washington. App. 939. He then asked:

Q. Okay, so, you took the statement from him, did he admit to being the driver in the statement?
A. Yes, he did.
Q. So, you charged him at that time?
A. No, I did not.
Q. And why is that?
Well, he said that he was the driver, from what he told me that, he states

A. that—...

at which point co-defendant's counsel interrupted and objected on hearsay and confrontation grounds. App. 939-40. Co-defendant's counsel said, "He's getting into what Ronnie Washington said in his statement and he's certainly not here for me to cross-examine him." App. 940 (emphasis added). Judge Dickson sustained co-defendant's counsel's objection. App. 940.

Nevertheless, petitioner's counsel persisted in his questioning regarding what Ronnie Washington said outside of court. App. 940-42. Referring to Officer Shumpert's questioning of Washington, Petitioner's attorney asked:

Q. And did [Washington], didn't he, or did he say he knew my client?
A. Yes, sir.
Q. And how did he know my client?
A. He said they used to work together at Burger King.
Q. Uh-huh.
A. And I think they went to school together, but he used to run errands for him.
App. 940.

After eliciting this hearsay connecting the alleged getaway driver to his own client, trial counsel asked a few other questions about Washington not yet being arrested then surrendered examination to the co-defendants' attorneys. App. 941-43. The State rested after its lead investigator testified and none of the defendants called Washington as a witness.

During closing argument, trial counsel accused the solicitor of over-promising and under-delivering by not having Ronnie Washington testify. App. 11007-08. Attempting to draw an analogy to his defense of mere presence, he told the jury that the likely reason Ronnie Washington had not yet been charged was because of mere presence. App. 1 107-08.

At PCR, petitioner alleged trial counsel was ineffective for eliciting this hearsay about Ronnie Washington and his connection to petitioner. App. 1319-1321. App. 1326-1330. When trial counsel testified, he admitted that when Officer Shumpert took the stand, no evidence (that

was not hearsay) gave Officer Shumpert the basis for saying Ronnie Washington was the getaway driver. App. 1337-38. Trial counsel said he interviewed Ronnie Washington before trial at the solicitor's office. App. 1338-39. He expected Ronnie Washington to testify. App. 1339. When asked his "trial strategy behind asking Lieutenant Shumpert the details of Ronnie Washington's statement," trial counsel responded that Washington told him during their out-of court meeting that he did not see petitioner with a gun in the car. App. 1339-40. He said, "I wanted to have that set as he was the driver and then ask him if he ever saw a weapon with my client." App. 1340. He had Washington under subpoena, but elected not to call him to the stand. App. 1340-42.

ARGUMENT

The PCR court properly found that trial counsel had a strategic reason for eliciting the hearsay testimony about Ronnie Washington. The court said it did not need to rule on "whether this testimony was inadmissible hearsay because allowing the testimony to come in was a valid strategic decision." App. 1358. The court also properly held that no prejudice existed because, "The identity of the driver is of no consequence to Applicant's case." App. 1360.

The PCR court found that counsel articulated a strategic reason for not objecting to the statement because he wanted to draw out the fact that Washington was not charged and that Applicant was equally as culpable as Washington. The court found that counsel was able to argue to the jury that petitioner should be found not guilty as he was not as intimately involved as other codefendants. The PCR court also noted that counsel was able to argue for mere presence and that he hoped to draw a parallel between Applicant and Ronnie Washington, who was not charged murder. The PCR court properly found that counsel was able to effectively cross-examine Officer Shumpert on this issue.

The PCR court properly found that even if the testimony was inadmissible, it does not preclude counsel from having a strategic reason for eliciting the testimony at trial. See Janoskv v. St. Amand. 594 F.3d 39, 48 (1st Cir. 2010) (no ineffective assistance of counsel where a decision to elicit otherwise inadmissible hearsay testimony "was part of a calculated trial strategy aimed at poking holes in" the state's case); Figueroa v. Heath. No. 10-CV-0121 JFB, 2011 WL 1838781, at *16 (E.D.N.Y. May 13, 2011) (no ineffective assistance of counsel where "[t]he trial record demonstrates that counsel's decision [...] was part of a strategy designed not only to show that the prosecution engaged in improper Rosario violations, but also to undermine the police's credibility by highlighting their failure to turn over relevant evidence to the defense."); Krist v. Foltz. 804 F.2d 944, 947 (6th Cir. 1986) (no ineffective assistance of counsel for eliciting otherwise inadmissible evidence).

Petitioner argues that the PCR court finding there was a strategic reason for eliciting the hearsay testimony and that the identity of the driver was of no consequence to Applicant's case is logically inconsistent and error. The State argues that Petitioner is misconstruing the context in which the PCR court made these findings. The PCR court properly found that counsel had a strategic reason for eliciting testimony that law enforcement had the name of the getaway driver, but that no charges were brought against him. Counsel eliciting this testimony, in conjunction with the mere presence defense presented, provides the jury with an inference that petitioner should be found not guilty because the driver had not been charged. Counsel eliciting testimony that a potentially more culpable party was not charged was an effective strategic decision. Also, the PCR court found that the identity of the driver was not relevant in deciding whether or not Applicant could show prejudice. The PCR court properly found that even if it was never revealed that Ronnie Washington was the driver, Tyler's testimony still would have shown that a driver

was involved. Petitioner was not prejudiced, because Tyler's testimony already placed petitioner in the vehicle that transported them to the scene of the crime. The only information the hearsay testimony about Ronnie Washington added was that petitioner knew the getaway driver and that law enforcement had not charged the known driver. The PCR court also noted that it was likely beneficial to petitioner that counsel was able to question Officer Shumpert specifically about Ronnie Washington, because he was able to question him as to why there were no charges brought against him.

Petitioner cites to Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), where this Court determined that it would apply a harmless error standard in determining whether or not eliciting hearsay testimony requires reversal. The State argues that, if counsel is found to be ineffective, that the admission of the hearsay testimony was harmless to petitioner. As previously stated, the only new factual information that was provided by the hearsay testimony was that Ronnie Washington was the driver and that he knew petitioner. The addition of this new information is harmless to petitioner in that it does not provide anything damaging factually. The testimony Tyler provided at trial already placed petitioner in the vehicle with the other co-defendants. Officer Shumpert testifying that Ronnie Washington knows petitioner adds nothing damaging to the State's case, as this fact does not compound or add to anything that had not already been testified to at trial. Petitioner also notes that the "issues" were compounded by the fact that petitioner did not have the opportunity to cross-examine Washington as to his statement. Counsel credibly testified at the PCR hearing that he subpoenaed Washington and had the ability to call him if necessary. Counsel testified that he interviewed Washington prior to trial and was aware generally as to what his testimony would have been. Counsel testified that he felt that Washington's testimony would have corroborated Tyler's testimony and that it would not have

been beneficial to petitioner. Counsel also testified that he discussed calling Washington with petitioner and that petitioner did not wish to call Washington as a witness.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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August 7, 2019

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In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
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Maite Murphy, Circuit Court Judge

Appellate Case No. 2018-001530

CHRISTIAN COLEMAN, PETITIONER,

v.

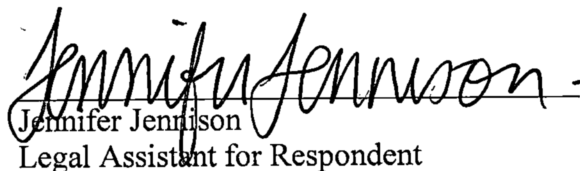
STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

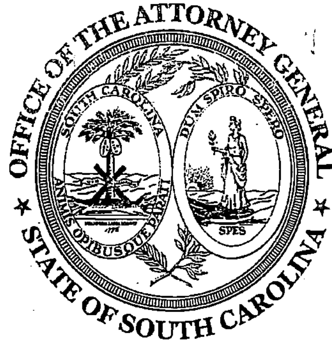
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 7th day of August, 2019.



Jennifer Jennison
Legal Assistant for Respondent



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AUG 07 2019
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 7, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Christian Coleman v. State of South Carolina
Appellate Case No.: 2018-001530

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jj
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division

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